NO. 86-817

In the Supreme Court of the United States

OCTOBER TERM, 1986

C. T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,

Petitioners,

V.

ARKOMA ASSOCIATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTE:

OTHER:

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This brief is respectfully submitted on behalf of respondent, Arkoma Associates (hereinafter "plaintiff") in opposition to the petition of petitioners C.T. Carden and Leonard L. Limes (hereinafter "defendants"), and Magee Drilling Company (hereinafter "intervenor") for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

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[1] The decision of the Court of Appeals in *Arkoma Associates v. C.T. Carden, et al.*, No. 86-9201, is set forth in full as Appendix "B" to petitioners' petition.

STATEMENT OF THE CASE

Plaintiff, Arkoma Associates, an Arizonia limited partnership, filed this action in the United States District Court for the Eastern District of Louisiana seeking a money judgment in the amount of $560,000 against defendants C.T. Carden and Leonard L. Limes as the guarantors of an equipment lease between plaintiff and Magee Drilling Company, an intervenor in this action.

Defendants moved to dismiss plaintiff's action for lack of diversity jurisdiction. Defendants C.T. Carden and Leonard L. Limes are both citizens of Louisiana. Of the four general partners of Arkoma Associates, two are citizens of Arizonia and two are citizens of Oklahoma. Of the forty-four limited partners of Arkoma Associates, only one is a citizen of Louisiana.

The district court denied defendants' motion, holding that diversity jurisdiction existed, but certifying the issue for interlocutory appeal pursuant to 28 U.S.C. §1292(b).[2] The Fifth Circuit Court of Appeals, however, denied defendants' petition for review of the district court's interlocutory order. Petitioners now petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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[2] The decision of the United States District Court for the Eastern District of Louisiana in *Arkoma Associates v. C. Tom Carden, et al.*, No. 85-2295 (April 23, 1986), is set forth in full as Appendix "A" to petitioners' petition.

REASONS FOR DENYING THE WRIT

Petitioners seek review in this Court of the decision of the United States Court of Appeals for the Fifth Circuit not to permit an appeal of the interlocutory order of the district court denying defendants' motion to dismiss for lack of jurisdiction. While petitioners may feel that the district court's ruling was incorrect, they cannot appeal the decision of the court of appeals not to permit the appeal from the interlocutory order since final discretion to accept or reject appeals under 28 U.S.C. §1292(b) rests with the court of appeals. As was explained in the report of the Senate Judiciary Committee prior to the enactment of section 1292(b) in 1958:

> The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. . . . But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

U.S. Code Congressional and Administrative News, 85th Cong., 2d Sess., pp. 5256-57 (1958).

This Court gave recognition to the principle that the final discretion to accept or reject the appeal of an interlocutory order under section 1292(b) rests exclusively

with the court of appeals in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), wherein it was stated that an appellate court may deny a section 1292(b) appeal for "any reason, including docket congestion." *Id.* at 475 (footnote omitted). Furthermore, as stated in *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1983), "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Id.* at 384. This is clearly not such a case.

In the absence of error in this case by the court of appeals, petitioners, in reality, seek review of the order of the trial judge denying their motion to dismiss. However, the order of the trial judge is an interlocutory order, not a final decree, a fact that of itself alone furnishes sufficient ground for the denial of the petition for writ of certiorari in this case. *See Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). As stated in *Cobbledick v. United States*, 309 U.S. 323 (1940):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all.

Id. at 324-25 (footnotes omitted).

Accordingly, this Court has made it its normal practice to deny interlocutory review, *see Estelle v. Gamble*, 429 U.S. 97 (1976) (Stevens, J., dissenting), and there is no reason to deviate from that practicve in this case. Since

interlocutory orders are merged into the final judgment of a district court, they are appropriately reviewed on appeal from the final judgment of the trial court.

Finally, the decision of the district court on defendants' motion in this case does not conflict with the decision of this Court in *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980). The issue presented in this case is whether the citizenship of a limited partnership is determined by reference to the citizenship of its general partners alone, or whether it is determined by reference to both the general and limited partners. As Justice Blackmun correctly noted in *Navarro,* this Court expressed no view on that issue in that case. *Id.* at 475 n.6 (Blackmun, J., dissenting). In *Navarro,* this Court addressed the related issue of how to determine the citizenship of the business trust organization. *Id.* at 458. This Court affirmed the "real party in interest" approach the Fifth Circuit Court of Appeals used in that case, and reaffirmed that only those persons who are real and substantial parties to the controversy will be considered in determining diversity jurisdiction. *Id.* at 460. Since the beneficial shareholders in *Navarro* retained only severely restricted powers of intervention and control, their citizenship was irrelevant, and the trustees were entitled to invoke the diversity jurisdiction of the federal court based on their own citizenship. *Id.* at 465-66.

While this Court did not explicitly extend the approach used in *Navarro* to the determination of federal diversity jurisdiction over cases in which a limited partnership is a party, the real party in interest test of *Navarro*

is equally appropriate in such cases. The trial court's application of that approach in the instant case does not conflict with this Court's decision in *Navarro.*

CONCLUSION

Petitioners have failed to show that the decision of the Fifth Circuit Court of Appeals to deny defendants' petition for a review of the interlocutory order of the district court was incorrect. This Court has traditionally refused to review the interlocutory orders of trial courts and should not make an exception in this case. Furthermore, the decisions of the district and appellate courts in this case do not conflict with the applicable decisions of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: New Orleans, Louisiana
December 12, 1986

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondent's Brief in Opposition were served on all parties of record by depositing same in the United States mail, first-class postage prepaid and properly addressed to Richard K. Ingolia, Esq., Berke & Ingolia, 200 Oil & Gas Building, 1100 Tulane Avenue, New Orleans, Louisiana, 70112, this 12th day of December 1986.

/s/ MITCHELL J. HOFFMAN